Supreme Court, U. S.
FILED
SEP 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-142

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant

v.

JESUS RODRIGUEZ CINTRON,
Appellee.

On Appeal from the United States District Court for the District of Puerto Rico

BRIEF OF THE COMMONWEALTH OF PUERTO RICO, AS AMICUS CURIAE

MIRIAM NAVEIRA DE RODON
Solictor General

RUTH TENTORI
Assistant Solicitor General
The Commonwealth of Puerto Rico
San Juan, Puerto Rico
00904

LYNN R. COLEMAN
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
INTEREST OF THE COMMONWEALTH OF PUERTO RICO AS AMICUS CURIAE	4
STATEMENT OF THE CASE	5
APPELLANT'S MOTION TO VACATE SHOULD BE DENIED	7
THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED	9
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 6, 11
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 17, 18
Dandridge v. *Williams*, 397 U.S. 471 (1970) 15
Downes v. *Bidwell*, 182 U.S. 244 (1901) 11
Graham v. *Richardson*, 403 U.S. 365 (1971) 13, 16
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 11
Kent v. Dulles, 357 U.S. 116 (1957) 16
Levinson v. *Deupree*, 345 U.S. 648 (1953) 8, n.3
Mora v. *Mejias*, 206 F.2d 377 (1st Cir. 1953) 18
Murga v. *Secretary of Health, Education and Welfare*, Civil No. 351-70 (D.P.R.) 12, 14
Reid v. *Covert*, 354 U.S. 1 (1956) 6
Schneider v. *Rusk*, 377 U.S. 163 (1963) 6, 10, 11
Shapiro v. *Thompson*, 394 U.S. 618 (1969) .. 6, 11, 13, 16, 17
Sosna v. *Iowa*, 419 U.S. 393 (1975) 8
The Passenger Cases, 7 How. 283 (1949) 10

Page

STATUTES, RULES AND REGULATIONS:

Puerto Rican Federal Relations Act, 48 U.S.C.A. §§ 731, *et seq.* 9, n.4
Rule 17, Fed. R. Civ. P. 7
Rule 25, Fed. R. Civ. P. 8

SECONDARY MATERIALS:

Chafee, Three Human Rights in the Constitution of 1787 (1956) 16
Congressional Record 14
28 State Department Bulletin 584 (1953) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-142

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant

v.

JESUS RODRIGUEZ CINTRON,
Appellee.

On Appeal from the United States District Court for the District of Puerto Rico

---

BRIEF OF THE COMMONWEALTH OF PUERTO RICO, AS AMICUS CURIAE

Appellants have taken this appeal from the judgment of the United States District Court for the District of Puerto Rico, entered on April 7, 1975, declaring unconstitutional an act of Congress and perma-

nently enjoining its enforcement. Notice of appeal was filed on April 30, 1975. On June 19, 1975, Mr. Justice Brennan extended the time for docketing the appeal to and including July 29, 1975. On July 30, 1975, the Office of the Solicitor General of the Commonwealth of Puerto Rico was notified by appellant that the above entitled cause had been docketed before this Court on July 25, 1975, and was served with a copy of Appellant's Jurisdictional Statement and Motion to Vacate. The Commonwealth of Puerto Rico, as amicus curiae, submits this statement pursuant to Rule 42(4) of the rules of this Court.

QUESTION PRESENTED

Whether Congress may constitutionally exclude American citizens residing in the Commonwealth of Puerto Rico from eligibility for special old age benefits upon the grounds that said residents are not subject to federal income tax liability.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, of the Constitution of the United States in its pertinent part provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .".

The Fifth Amendment of the Constitution of the United States in its pertinent part provides that:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .".

Section 228 of the Social Security Act. 42 U.S.C. § 428 provides for payment of special old age benefits

to certain person who are unable to comply with the requirements for insured status under the Social Security Act. Section 228(a), 42 U.S.C. § 428(a), provides as follows:

> "(a) Every individual who—
>
> (1) has attained the age of 72,
>
> (2) (A) attained such age before 1968, or (B) has not less than 3 quarters of coverage whenever acquired, for each calendar year elapsing after 1966 and before the year in which he attained such age,
>
> (3) is a resident of the United States (as defined in subsection (e) of this section), and is (A) a citizen of the United States or (B) an alien lawfully admitted for permanent residence who has resided in the United States (as defined in section 410(i) of this title) continuously during the 5 years immediately preceding the month in which he files application under this section, and
>
> (4) has filed application for benefits under this section, shall (subject to the limitations in this section) be entitled to a benefit under this section for each month beginning with the first month after September 1966 in which he becomes so entitled to such benefits and ending with the month preceding the month in which he dies. No application under this section which is filed by an individual more than 3 months before the first month in which he meets the requirements of paragraphs (1), (2), and (3) shall be accepted as an application for purposes of this section".

Section 228(e), 42 U.S.C. § 428(e) provides:

> "(e) The benefit to which any individual is entitled under this section for any month shall not

be paid if, during such month, such individual is not a resident of the United States. For purposes of this subsection, the term 'United States' means the 50 States and the District of Columbia".

Section 210(i), 42 U.S.C. § 410(i) provides:

"(i) The term 'United States', when used in a geographical sense means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa".

INTEREST OF THE COMMONWEALTH OF PUERTO RICO AS AMICUS CURIAE

The Commonwealth of Puerto Rico's interest as amicus curiae, lies in the fact that the statutes involved, 42 U.S.C. §§ 428(a), (e) and 410(i), adversely affect a large number [1] of American citizens who happen to be residents of Puerto Rico.

The challenged statute is unconstitutional on its face because it violates the Due Process Clause of the Fifth Amendment to the Constitution when it excludes American citizens from the social benefits provided by the statute solely on the basis of their residence. The classification made by Congress is not rationally based and is not free from invidious discrimination inasmuch as it purports to give to American citizens and qualifying aliens residing in one of the 50 States or the District of Columbia the social benefits of the statute in question while denying those same benefits to American citizens and aliens residing in Puerto

[1] According to the census of 1970, there were around 28,368 persons who had reached the age of 72 before 1968. This group included 13,354 males and 14,512 females. See General Population Characteristics, Puerto Rico, 1970, U.S. Department of Commerce, P.C. (1), p. 53, P.R.P. 5352,53.

Rico, especially when no compelling interest can be advanced to justify said classification.

The Commonwealth of Puerto Rico, under the doctrine of parens patrie, has the inherent power and authority to provide protection of the person and property of its citizens. Under that doctrine the state has the sovereign power of guardianship over persons disabled because of their inability to provide for themselves. These elderly citizens, who no longer can form part of the labor force, are wards of the state. Therefrom arises a pecuniary interest and obligation of the sovereign to secure all social benefits which may be due such citizens through social legislation.

We acknowledge that the questions raised are substantial as Appellant contends, and, for that reason, the Court may wish to give plenary consideration to the appeal and elaborate on certain of the grounds for decision, even though the result reached below is clearly correct. For that reason, we would not object to the Court's noting probable jurisdiction. However, because of the critical importance of the case to Puerto Rican citizens of the United States, we strongly urge the Court to deny Appellant's Motion To Vacate (discussed *infra*) and affirm the judgment, either summarily or after plenary consideration.

STATEMENT OF THE CASE

On December 8, 1972, the present suit was filed in the name of Jesús Rodríguez Cintrón, an American citizen, domiciled in Puerto Rico, in his own behalf and on behalf of citizens of the United States, domiciled in Puerto Rico, being more than 72 years of age and entitled to the benefits of Section 228(a) of

Title 2 of the Social Security Act, 42 U.S.C. § 428(a). The Complaint alleged that Cintrón and the members of the class he represented were entitled to the benefits of Section 228(a) on the grounds that the Federal Government had established an invidious discrimination against American citizens domiciled in Puerto Rico, in violation of the Due Process Clause of the Fifth Amendment, by excluding American citizens domiciled in Puerto Rico from the benefits of the aforementioned statute and limiting said benefits to American citizens and alien residents of the 50 States and the District of Columbia. Counsel for the class was unaware that the named plaintiff had died on October 3, 1972.

A three-judge district court convened pursuant to 28 U.S.C. §§ 2282 & 2284 held, on April 7, 1975, in a 2 to 1 decision, that the Constitution binds the Federal Government in its exercise of power over American citizens who reside in Puerto Rico and that therefore such persons are entitled to benefit from the principles of equal protection of the laws under the Fifth Amendment of the Constitution, citing *Reid* v. *Covert,* 354 U.S. 1 (1956); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Schneider* v. *Rusk,* 377 U.S. 163 (1963). Thus the definition of the term "United States" in Section 228(e), Title II of the Social Security Act was held to be unconstitutional since it excludes United States citizen residents of Puerto Rico from eligibility for the benefits under Section 228. That definition was also held to be repugnant to the Fifth Amendment inasmuch as said persons constitute a discrete and insular minority to whom available social welfare benefits should not be denied in the absence of a compelling governmental

interest, and that no such interest supported the classification established by Section 228. The court proceeded to enjoin the defendant-appellant from enforcing said Section as written.

APPELLANT'S MOTION TO VACATE SHOULD BE DENIED

Appellant's Motion To Vacate, requesting remand to the court below with instructions to dismiss for want of jurisdiction, should be denied. Appellant argues that the death of the named Appellee effectively mooted his claim, there thus was no "case or controversy," and further that the district court's certification of a class was ineffective to cure this defect. Appellant does not allege that the Government's defense was in any way prejudiced by Appellee's death, nor could any such prejudice be alleged since only questions of law were involved in the court below.

Appellee has moved for substitution of the named Appellee's widow and surviving children. Appellee's Brief states that the fact of the named Appellee's death was unknown to counsel for Appellee and, indeed, the question has been raised for the first time in this Court by Appellant. The Commonwealth of Puerto Rico believes that Appellee's Motion For Substitution should be granted, or that in the order disposing of this case, the district court should be directed to allow the substitution. In any event, Appellant's Motion To Vacate should be denied. For this case to be aborted at this late point for failure of the pleadings to reflect the real party in interest, would produce a grossly unjust result.

It appears that with the named Appellee's death, the suit should have been instituted in the name of the decedent's estate which had a clear right to pursue his claim. Rule 17(a), FRCP, permits liberal substitution

or joinder in cases where a suit is not commenced by the real party in interest.[2] Rule 25(a), FRCP, permits substitution of successors or representatives of a deceased party to a suit. Appellee's death did not moot his claim which survived in his estate, and the suit instituted here in the name of Appellee was not a nullity; the complaint was therefore effective to institute a case or controversy even though it was filed in the name of one other than the real party in interest.[3] We also suggest that the filing of this perfectible cause of action should be regarded as sufficient basis for the lower court's certification of a class. Under *Sosna* v. *Iowa,* 419 U.S. 393 (1975), therefore, at the time of certification, the class acquired a status separate and apart from the named class representative with full power to carry on the suit.

This Court, in the exercise of its sound discretion, may take into consideration the obvious fact of the futility of imposing upon the duly certified class of elderly citizens, who have already outlived their life expectancy, the mere technical rigor of exhaustion of administrative remedies when it is well established that the Social Security Administration will not have the authority to solve the constitutional question at issue

---

[2] "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed *after objection* for . . . joinder or substitution of, the real party in interest, and such . . . joinder or substiution shall have the same effect as if the action had been commenced in the name of the real party in interest." Rule 17(a), FRCP (emphasis added).

[3] See *Levinson* v. *Deupree,* 345 U.S. 648 (1953), cited in the Committee Note of 1966 to Amended Rule 17(a), 3A Moore's Federal Practice ¶ 17.01[8] (1974), as an example of the principle which Rule 17(a) was designed to foster.

and will therefore be compelled to deny them the benefits sought. We submit that the waiting period to which this discrete and insular minority has been subjected should no longer be prolonged, and that prompt substantial justice be made available to this dwindling class.

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED

The exclusion of American citizens domiciled in the Commonwealth of Puerto Rico from the benefits of Section 228 of the Social Security Act, is clearly violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.[4] The statute in question provides for the award of monthly old age benefits, upon application, to every individual who has attained the age of 72 before 1968, or who has worked a certain length of time while covered under Social Security for each calendar year elapsing after 1966 and before the year in which he attained the age of 72. It also requires that applicants be United States citizens or aliens residing in the United States as defined in Section 228(e), which in pertinent part, reads:

> . . . For the purposes of this subsection, the term 'United States' means the 50 States and the District of Columbia.

Such a restriction on the definition of the term "United States" is discriminatory because an American citizen can not be classified by the geographical

---

[4] While, for reasons set forth herein, the exclusion of Puerto Ricans from the Prouty Amendment benefits is unconstitutionally discriminatory, there may well be other situations where certain differences in treatment of Puerto Ricans residents, or differences in federal regulatory policies toward Puerto Rico, are justified and desirable, based upon different economic and social conditions existing in Puerto Rico. The compact between the Puerto Rican people and the United States, 48 U.S.C.A. §§ 731 *et seq.* admits of such flexibility.

site of his residence to determine his eligibility for such social benefits, especially when no compelling interest exists for such a classification. A United States citizen has certain fundamental rights that undoubtedly can not be divested solely on the basis of residence. To say the Constitution empowers Congress to discriminate against United States citizens by creating this classification through legislation would be tantamount to stripping American citizens of their right to freedom of movement within the American geographical area. A United States citizen is a person and not a geographical entity and as such is entitled to equal and full protection of the laws. As was clearly stated in *Schneider* v. *Rusk,* 377 U.S. 163, 168-69 (1964):

> . . . While the Fifth Amendment contains no equal protection clause it does forbid discrimination that is 'so injustifiable as to be violative of due process'. Bolling v. Sharpe, 347 U.S. 497, 499. . . . The discrimination addressed at naturalized citizens drastically limits their rights to live and work abroad in a way other citizens may. It creates indeed a second-class citizenship.

The concept of second class citizenship was firmly rejected by Chief Justice Taney in the *Passenger* cases, 7 How. 283, 492 (1949) when the Court expressed:

> For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States.

It is the contention of the Commonwealth of Puerto Rico that Congress, in legislating welfare programs, is subject to the restrictions of the Bill of Rights. Since the famous Insular Cases, decided at th turn of the century, it has been firmly established that Congress must honor the fundamental personal protections contained in the Bill of Rights whenever and wherever it

acts. See e.g. *Downes* v. *Bidwell,* 182 U.S. 244 (1901). This Court has repeatedly held that equal protection standards are applicable to the federal establishment via the Due Process Clause in the Fifth Amendment. In *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), which extended the holding of *Brown* v. *Board of Education,* 347 U.S. 483 (1954), to the federally-sponsored segregated school system in the District of Columbia, Chief Justice Warren announced:

> The Fifth Amendment . . . does not contain an Equal Protection Clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of unfairness than 'due process of law', and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. *Bolling* at 499.

The federal equal protection concept established in *Bolling* has been consistently applied by the Court. See *Shapiro* v. *Thompson,* 394 U.S. 618, 641-42 (1969); *Katzenbach* v. *Morgan,* 384 U.S. 641, 656-58 (1966); *Schneider* v. *Rusk,* 377 U.S. 163 (1964).

In *Bolling,* Chief Justice Warren pointed out that "in view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. There is nothing in the national legislative process which makes it less amenable to the occasional tyranny of majorities and, hence, the constitutional protection of equal laws." 347 U.S. at 500.

Appellant argues that a rational basis exists for the restrictive definition of United States in Section 228(e) because the benefits would be paid from general revenues and Puerto Rican residents are not subject to U.S. income taxes. This same contention was made in detail in *Ramón Murga Murga* v. *Secretary of Health, Education and Welfare,* Civil No. 351-70 (D.P.R.) in the same District Court before Judge Hiram R. Cancio. There, the Court dismissed the action on the grounds that the administrative remedies had not been exhausted by plaintiff and that the Constitution of the United States did not apply to the Commonwealth of Puerto Rico by its own force. From this determination plaintiff filed a timely appeal but upon plaintiff's motion the appeal was dismissed.

In the *Murga* case, *supra,* defendant-appellant argued that American citizens domiciliaries in the Commonwealth of Puerto Rico were not included in this social measure because the legislative history of Section 228 demonstrated that there was a reasonable basis for the exclusion of said citizens from coverage, since the aforementioned section was enacted as an amendment to the Tax Adjustment Act of 1966 (Pub. L 89-368, § 302(a), 80 Stat. 67), an act designed to raise revenue for the Federal Government. In other words, said contention implied that inasmuch as Puerto Rican residents of the Commonwealth of Puerto Rico are not subject to the Federal Internal Revenue laws, they are barred from becoming recipients of old age assistance according to Section 228.

After a thorough reading of the Congressional Record, it appears that inclusion of Puerto Rican residents was opposed on the grounds that financing would come out of General Treasury funds and that the recipients

of said measure had not contributed (to the Social Security System), "one penny for it, who have no claim nor *title whatever to it,* and who have no need of it".—Congressional Record Senate, March 8, 1966, page 5300. (Emphasis supplied)

Nowhere during the legislative discussion of Section 228, also known as the "Prouty Amendment," did there appear to be any regard to, or requirement that the beneficiary of said measure had to be a taxpayer. This Honorable Court may take judicial notice of the fact that people who have reached the age of 72 years or more are not generally taxpayers.

It should be further noted than an American citizen or alien may have been a federal taxpayer all his life although not a contributor to the Social Security System and by the mere fact that he decides to change his residence within American territory from one of the 50 States or the District of Columbia to Puerto Rico, he may lose the benefits which he may have been receiving under Section 228(e) of the Social Security Act. As it was said in *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), public welfare cannot be denied a citizen on the basis of long term residence or payment of taxes. There, this Court stated that such restrictions violate the Equal Protection Clause because although a State (Congress in the present case) has a valid interest in preserving the fiscal integrity of its programs, it "may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an invidious classification." 394 U.S. at 633. As was pointed out in *Graham* v. *Richardson,* 403 U.S. 365, 375 (1971), "[s]ince an alien as well as a citizen is a person for equal protection purposes, a concern for fiscal integrity is no more compelling a jus-

tification for the questioned classification in these cases than it was in *Shapiro.*"

The spirit of Section 228 may be illustrated by quoting from the Congressional Record of the Senate, March 8, 1966, page 5301, where Senator Prouty said:

> What my amendment is intended to do is to take care of 1,500,000 elderly people 70 years of age or older who are desperate. There is no question about that. Do we want them to have a retirement annuity or do we want them to stand in the bread lines? If we wish to preserve some degree of human dignity in people who are retired teachers and other professional people, who were working before the social security program became effective, or were too old to qualify under the law which was approved last year, we can do it.

Section 228 of the Social Security Act is a remedial statute, designed to give financial aid to those citizens over 72 years of age or older, who failed to contribute to the system, as was pointed out in our previous discussion. The limits established by the section are clearly defined: Age and lack of contribution to the fund.

Elderly citizens are not exclusive to the 50 States and the District of Columbia. Puerto Rico also has its share of them. Lack of opportunities to contribute to the Social Security fund is no regional phenomenon. So when Congress enacted the section in question, it was clearly dealing with a general situation.

In the *Murga* case, *supra,* defendant-appellant stated that American citizens domiciled in the Commonwealth of Puerto Rico were not improperly excluded from the benefits provided in section 228 and based its contention upon the rationale used in *Dandrige* v. *Williams,* 397 U.S. 471 (1970), where it was said that if there was a "reasonable basis" for the distinction it was, therefore, valid. This Court in *Dandrige* stated, 397 U.S. at 485:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality,' *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific,' *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland,* 366 U.S. 420, 426".

We respectfully submit that the case at bar has nothing to do with mathematical computations or niceties. It involves the fundamental constitutional rights guaranteed by the Fifth Amendment to all American citizens, irrespective of residence, inasmuch as the statute as it stands, is violative of the right of the American citizens to select their place of residence.

The statute in question provides in its pertinent part that:

> The benefit to which any individual is entitled under this section for any month *shall not be paid if, during such month, such individual is not a resident of the United States.* For purposes of this subsection, the term 'United States' means the 50 States and the District of Columbia. (Emphasis supplied)

It is our contention that the above cited provision curtails and restricts the right to travel of American citizens, which has been held to be part of the "liberty" of which an American citizen cannot be deprived without Due Process of Law under the Fifth Amendment of the Constitution of the United States. *Kent* v. *Dulles,* 357 U.S. 116 (1957).

In *Kent* v. *Dulles, supra,* 357 U.S. at 126, this Court, in emphasizing the meaning of freedom of movement and how deeply engrained in our history this freedom is, cited with approval Chafee's Three Human Rights in the Constitution of 1787 (1956) 171-181, 197, as follows:

> Our Nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, 'do as he pleases, go where he pleases'.

The Court also stated that:

> Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *Nevada,* 6 Wall. 35, 44; *William* v. *Fears,* 179 U.S. 270, 274; *Edwards* v. *California,* 314 U.S. 160.

In *Shapiro* v. *Thompson, supra,* and *Graham* v. *Richardson, supra,* state and federal statutes were declared unconstitutional by this Court because the requirement of a waiting period of residence to qualify as a recipient of welfare had the effect of penalizing the

rightful exercise of the individual to travel. It was said in *Shapiro, supra,* 394 U.S. at 641-42:

> The waiting-period requirement in the District of Columbia Code involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due Process Clause of the Fifth Amendment. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process,'" *Schneider* v. *Rusk,* 377 U.S. 163, 168 (1954), *Bolling* v. *Sharpe,* 317 U.S. 497 (1954). For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid—the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that *they have not been residents* of the District of Columbia for one year at the time their applications are filed. (Emphasis supplied).

We will not discuss appellant's statement regarding the plenary powers of Congress to make all needfull rules and regulations respecting the territories belonging to the United States, under Article IV, Section 3 of the United States Constitution, since we understand that this question was definitely settled by the case of *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 472 (1974), which cited with approval from *Mora* v. *Mejías,* 206 F.2d 377 (1953) the following:

> [By virtue of the 1952 compact] Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of

> the word . . . . It is a political entity created by the act [Pub. Law No. 600, 64 Stat. 319] and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.

The position which the United States has adopted before the United Nations regarding Puerto Rico is consistent with the one expressed by this Court in the *Calero-Toledo* case. See 28 State Dept. Bull. 584, 587 (1953). Definitely, Puerto Rico, by virtue of the 1952 compact, ceased to be a colony or a territory.

Furthermore, it should be noted that the same territorial argument was set forth in the court below in Appellant's Supplemental Brief in Support of Motion for Summary Judgment of August 24, 1974, (Appendix A) and the same was withdrawn by Appellant as a result of our Reply Memorandum of September 11, 1974 (Appendix B) as per Appellant's Supplemental Memorandum of December 17, 1974 (Appendix C). In a letter sent by the Deputy Attorney General on November 14, 1974 to the Secretary of Justice of the Commonwealth of Puerto Rico (Appendix D), it was specifically stated that, regrettably, the Federal Government's brief unnecessarily and incorrectly characterized Puerto Rico as a territory in making these arguments and that this characterization was non-essential and, in fact, irrelevant to the legal considerations at hand. After this clarification, Deputy Attorney General Silberman proceeded to instruct the U.S. Attorney for the District of Puerto Rico to advise the Court to disregard those portions of the Federal Government's brief which characterized Puerto Rico as a territory, which instruction was promply followed.

CONCLUSION

The spirit of the statute is to remedy in a very direct, immediate and personal way the economic situation of our elderly citizens, who are no longer capable of providing income for themselves. It is a fact that they no longer form a part of the working force. To deprive United States citizens of the benefits guaranteed by the statute for the sole reason that they have exercised their right to choose Puerto Rico as their place of residence, and not to grant alien residents of Puerto Rico the social benefits provided in the challenged statute would certainly be an invidious classification, repugnant to the Fifth Amendment of the United States Constitution.

WHEREFORE, the Commonwealth of Puerto Rico prays this Honorable Court deny Appellant's Motion To Vacate, and affirm the judgment of the court below, either summarily or after noting probable jurisdiction because the issues presented are substantial.

Respectfully submitted

MIRIAM NAVEIRA DE RODON
Solicitor General

RUTH TENTORI
Assistant Solicitor General
The Commonwealth of Puerto Rico
San Juan, Puerto Rico
00904

LYNN R. COLEMAN
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

APPENDIX

APPENDIX A

(Caption Omitted in Printing)

Defendant's Supplemental Brief in Support of Motion for Summary Judgment

Statement of the Case

This memorandum is intended to supplement the defendant's brief entitled "Brief in Support of Motion to Dismiss". The case involves plaintiff's claim for benefits under section 228 of the Social Security Act, 42 U.S.C.A. section 428.

Statement of the Facts

On December 8, 1972, the plaintiff, a citizen of the United States and Puerto Rico, residing in the Commonwealth of Puerto Rico, after having exhausted the appropriate administrative remedies, filed this action before this court. The plaintiff's complaint is on his own behalf and on behalf of all other citizens of Puerto Rico and the United States, over the age of 72, residing in Puerto Rico, and claiming benefits under title II of the Social Security Act, section 228(a), 42 U.S.C. section 428(a). As a result of motions filed by the plaintiff, this action has been certified as a class action and is presently before this honorable three judge court. The parties have agreed to submit their arguments in the form of written memorandum.

Applicable Provisions of Law

Section 228 of the Act, 42 U.S.C.A. section 428, is the appropriate section in controversy. The appropriate portions of section 228 have been reprinted in Defendant's Brief in Support of Motion to Dismiss on page 2 and will not be duplicated herein.

Jurisdiction

This court has jurisdiction over the present controversy by virtue of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

The Issue

The issue for consideration is the plaintiff's allegation challenging the constitutionality of the limitation of benefits provided by section 228 of the Act to those otherwise qualified applicants who reside in the 50 States or the District of Columbia.

Argument

It appears that since the initiation of this action certain constitutional guarantees such as due process and equal protection do extend to the Commonwealth of Puerto Rico. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 94 S.Ct. 2080 (May 1974); and *Angel Acevedo Montalvo* v. *Honorable Rafael Hernandez Colon, et als.*, Civil No. 1113-73 (D. P.R., June 18, 1974). These cases would seem to limit the holding of the court in *Ramon Murga Murga* v. *Secretary of Health, Education, and Welfare,* Civil No. 351-70 (C.A. 1 No. 72-1053, December 30, 1971) as it related to the inapplicability of the United States Constitution to the Commonwealth of Puerto Rico.

However, the *Murga* case is still authority for the proposition that Congress has plenary power in determining which domestic laws extend to territories. The only limitation on this congressional latitude is that imposed by the extension of due process to Puerto Rican citizens in recent judicial precedent. It is clear from an analysis of section 228 of the Social Security Act, 42 U.S.C. 428, that its enactment was well within the scope of this congressional power.

In reviewing the history of Congress' plenary power in *Murga,* Judge Hiram K. Cancio quoted from *Downes* v. *Bidwell,* 182 U.S. 244, 21 S.Ct. 770 (1901) where the Supreme Court reviewed the history of plenary congressional power over acquired territories of the United States as follows:

> "That the power over the territories is vested in Congress without limitation, and that this power has been

> considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *M'Culloch* v. *Maryland,* 4 Wheat. 316, 422, 4 L.ed. 579, 605, and in *United States* v. *Gratiot,* 14 Pet. 526, 10 L.ed. 573. So, too, in *Church of Jesus Christ of L.D.S.* v. *United States,* 136 U.S. 1, 34 L.ed. 478, 10 Sup. Ct. Rep. 792, in holding that Congress had power to repeal the charter of the church. Mr. Justice Bradley used the following forceful language: '*The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States.* It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. * * *'" (Emphasis supplied.) 21 S.Ct. at p. 779.*

It is apparent from the authority cited by Judge Cancio that the plenary power of Congress with respect to territories is well established.

On pages 5 and 6 of his memorandum of July 22, 1974, plaintiff concedes that Congress is accorded expansive authority in the areas of social welfare when he contends that the real issue is whether Congress has abused its discretion to legislate and whether or not an invidious discrimination is present. On page 5 of the brief, plaintiff grants that in promoting general welfare legislation Congress as well as the States, have considerable latitude and are not subject to a straight jacket in making classifications. The plaintiff then goes on to cite and quote from *McGowan* v. *Maryland,* 366 U.S. 420 (1961) where additional authority for Congress' broad discretion is outlined.

The issue herein then becomes whether Congress has exceeded the broad scope of its authority to legislate in the area of social welfare with respect to territories such as the Commonwealth of Puerto Rico. The plaintiff has al-

leged that the enactment of section 228 of the Social Security Act constitutes a denial of equal protection of the law since it does not extend benefits to individuals living outside of the 50 States and the District of Columbia and particularly since residents of Puerto Rico are not included. The invalidity of this argument becomes apparent from an analysis of the requirements of equal protection as relevant to this civil action. Therefore, the "considerable latitude" which Congress enjoys in the area of economics and social welfare is augmented in situations where Congress is faced with the question of whether or not to extend benefits granted by domestic laws to territories.

Basically the equal protection clause has developed into a two tiered test by which to assess the constitutionality of a statute.[2] In the upper tier, legislation containing one of a few criteria which are deemed "suspect", or which affects rights which are deemed "fundamental", is subjected to a test of "strict scrutiny". *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). All other classifications are subjected only to the lower tier's minimal scrutiny, which demands that the classification be rationally related to a legitimate governmental objective. The lower tier standard is more easily met, and traditionally the court has denied equal protection challenges based on lack of rationality.[3] In this present action it is respectfully submitted that the statute under consideration must withstand at most only the traditional rational or reasonable basis test and not the test of strict judicial scrutiny.

At the outset, it should be noted that even the most superficial reading of section 228 of the Social Security Act reveals that the classification contained therein is not

---

[2] See generally Irrebutable Presumptions, 87 Harvard L. Rev. 1534 (May 1974) and Developments in the Law—Equal Protection, 82 Harvard L. Rev. 1065 (1969).

[3] Ibid.

arbitrary or invidiously discriminatory. Plaintiff's allegation that Puerto Rican citizen/residents who were statutorily granted American citizenship have had to bear the brunt of Congress' purpose in defining the statute's limits is patently untrue. Section 228(a) of the Social Security Act provides for the award of monthly benefits, to those otherwise qualified individuals residing in the 50 States and the District of Columbia. Judge Cancio in his opinion in *Murga, supra,* at page 6 analyzed the application of this provision as follows:

> ". . . section 228 *supra,* confers benefits on all who meet its conditions for entitlement providing that they reside in one of the 50 States or the District of Columbia. This provision applies equally to all citizens of the United States, whether or not they be of Puerto Rican origin; a citizen from the continental United States who takes up residence in the Commonwealth of Puerto Rico will not receive benefits under section 228 just as other residents of Puerto Rico are precluded."

The statute as Judge Cancio aptly pointed out, applies to *all* citizens qualifying thereunder. There is no classification as to alienage, nationality, or race. Any United States citizen living within the 50 States or the District of Columbia is eligible for coverage if the other requirements of the statute are met and any citizens residing outside these boundaries are excluded. So it would seem obvious that the statute does not improperly distinguish between domiciliaries of Puerto Rico and domiciliaries of the 50 States and the District of Columbia. The classification is simply one based on geographics which is a readily discernible real difference among potential social security recipients. In drafting section 228 of the Social Security Act, Congress did not arbitrarily single out residents of Puerto Rico and refuse to extend the benefits granted thereunder to them. Congress simply determined that it was feasible to extend the special grant of benefits under section 228 to

only residents of the United States and the District of Columbia rather than United States citizens wherever they might reside. Thus, the classification is "generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." *Morton, Secretary of the Interior* v. *Ruiz,* 415 U.S. 199, 94 S. Ct. 1055, 1072 (1974).

As mentioned *supra* in connection with the discussion of Congress' plenary power with respect to territories, the rational basis test has traditionally been applied to legislation in the areas of economics and social welfare. See *Geduldig v. Aiello, et al.,* 42 U.S.L.W. 4105 (U.S., June 17, 1974); *Kahn* v. *Shevin,* 42 U.S.L.W. 4591 (April 24, 1974); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Richardson* v. *Belcher,* 404 U.S. 78 (1971); and *Flemming* v. *Nestor,* 363 U.S. 606 (1960).

The proper test of equal protection and the manner of its application was perhaps most succinctly stated by the Supreme Court in *Dandridge* v. *Williams, supra,* as follows:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accomodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland,* 366 U.S. 420, 426."

Although the alleged statutory discrimination challenged here is Federal, these principles are equally applicable in

determining whether a statutory classification violates the equal protection clause as alleged in the instant case. Therefore, plaintiff's contention on page 7 of his brief that the more stringent strict judicial scrutiny test is applicable is not supported by the facts or Supreme Court precedent.

The constitutional power of Congress to decide the method by which to address the social welfare problems of the nation received early recognition and has been reaffirmed in recent years. The constitutional prerogative of Congress to address the social welfare ills of the country in a systematic way has been upheld since the early years of the social security program. *Stewart Machine Co.* v. *Davis,* 301 U.S. 548, 584 (1937); *Flemming* v. *Nestor, supra; Richardson* v. *Belcher, supra.* This principle is merely a corollary to the more basic principle that Congress does not have to legislate for an entire category of potential beneficiaries but rather has wide discretion in choosing whom and what to affect within the class. *Curran* v. *Wallace,* 306 U.S. 1 (1939).

With these principles in mind, it is clear that Congress can limit the effect of a statute to a certain class of individuals and that such a classification by necessity involves some amount of discriminatory application of the statutory remedy. But not all discrimination infringes on the constitutional guarantee of equal protection. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1970) and other cases cited in *Polelle* v. *Secretary of Health, Education, and Welfare,* Civil No. 73-C-774 (N.D. Ill., April 19, 1974) (copy attached). The constitution only prohibits that discrimination which is "invidious" discrimination or, rather, that which is not rationally related to a legitimate governmental interest. *Richardson* v. *Belcher, supra.*

The United States Supreme Court recently reaffirmed the foregoing principles of *Geduldig* v. *Aiello, supra,* where

the court upheld the exclusion of unemployment insurance benefits under the California unemployment insurance code for women who underwent a normal pregnancy. With respect to the constitutional restrictions on the power of legislatures to provide social welfare benefits to particular classes of individuals the court found:

> "This Court has held that, consistently with the Equal Protection Clause, a State 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others . . .' *Williams* v. *Lee Optical Co.*, 348 U.S. 483, 489; *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). *Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.* '[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.' *Dandridge* v. *Williams, supra.*" (Emphasis supplied.)

Thus, the court in *Geduldig* not only reaffirmed the constitutional power of legislatures to address a problem selectively but also specifically refuted the proposition that something other than the traditional rational relationship test should apply in the area of social welfare. In the instant situation of course, Congress has not actively excluded citizens of Puerto Rico but simply refused to extend benefits generally to the entire population of United States citizens residing throughout the world.

The legislative history of section 228 also demonstrates that Congress sought to further legitimate governmental purposes by this statutory enactment. Section 228 was enacted as an amendment to the Tax Adjustment Act of 1966 (Pub. L. 89-368, section 302(a), 80 Stat. 67), an act designed to raise revenue for the Federal Government (see 112 Cong. Rec. 5292, 5293 (comments of Senator Long)).

As introduced on the floor of and passed by the Senate, the legislation would have provided for the award of monthly benefits, upon application, to every individual (including lawfully admitted aliens with at least 5 years' residence) of 70 years of age or older, not otherwise entitled to social security benefits, residing in Puerto Rico as well as the 50 States and the District of Columbia. (112 Cong. Rec. 5288-5301). In addition, provision was made for financing these benefits by authorizing annual appropriations to the Federal Old-Age and Survivors Insurance Trust Fund in an amount equal to the benefits paid out plus related administrative costs (112 Cong. Rec. 5289).

In the conference of the two chambers of Congress, however, the House conferees strongly opposed the amendment. It was pointed out that no hearings had been held to determine the extent of the problems of the elderly poor. The language of the amendment was criticized as being loose, as having broad implications which had not been fully considered, and as providing benefits for more persons than just the needy aged. It was noted that the amendment, by not requiring any minimum eligibility in covered work, seriously contradicted the fundamental concepts of the self-supporting, contributory social security system. It was further noted that the amendment had the effect of repealing transitional requirements for persons 72 years or older enacted the year before, authorized the payment of benefits in addition to payments already being received under other pension plans, and provided for greater benefits than were available to the aged the previous year. Finally, it was pointed out that the amendment would have the effect of shifting an additional part of the burden of supporting the needy aged from State funds to Federal funds (112 Cong. Rec. 5792 (comments of Representative Mills), 5946 (comments of Senator Long)).

At the insistence of the House conferees, the legislation was changed to the form presently embodied in section 228

by increasing the minimum eligible age to 72 years, reducing the amount of monthly benefits payable, adding additional requirements for eligibility and for the reduction of benefits, and limiting coverage to domiciliaries of the 50 States and the District of Columbia (112 Cong. Rec. 5788-89, 5792-93, 5945, 5946, 5949-50). The effect of these changes was to reduce the number of eligible beneficiaries from an estimated 1.5 million to 370,000, and to reduce the expected cost to the Federal Government from over $700 million to $95 million for the first year (112 Cong. Rec. 5291-5292, 5792-5793, 5946). The legislation as recommended by the conference committee was passed by both chambers of Congress (112 Cong. Rec. 5801, 5960) and became law upon its signature by the President (112 Cong. Rec. 6273).

The legislative history thus reveals that in enacting section 228, Congress, while desiring to establish a program of benefits for the needy aged who were not covered under other governmental plans, did not want to impose a severe burden upon the Federal treasury. Although the reasons for the restrictions were in large part fiscal, Congress also wanted to avoid establishing a program which might undermine the self-supporting, contributory nature of the social security system.

From this legislative history, it is plain that there is a "reasonable basis" for the scope of the statute, and that the limitations contained therein are not violative of due process or equal protection because the statute does not encompass domiciliaries outside of the 50 States and the District of Columbia.[4] For in order to achieve its purposes,

[4] Similar distinctions between States and Puerto Rico exist under other government-financed social security programs. Section 1108 of the Social Security Act 42 U.S.C. 1308. See, e.g., title I of the Social Security Act, 42 U.S.C. 301 *et seq.*, providing for grants to States for old-age assistance and medical assistance for the aged. Under 42 U.S.C. 303, States receive from the Federal government up to 31/37 of their expenditures under the program, plus an additional amount called the "Federal percentage" (as

Congress could validly limit the program to the 50 States and District of Columbia, whose domiciliaries are subject to the Federal internal revenue laws and thereby finance the benefits which the needy aged among them are eligible to receive under section 228. It is important to remember that the Prouty Amendment, which was subsequently enacted as section 228 of the Social Security Act, was appropriately an amendment to an Internal Revenue Tax statute for the reason that revenue to finance this extraordinary grant of social security benefits was drawn not from the Social Security Trust Fund but from the Federal Treasury. The purpose of the Prouty Amendment was to provide benefits to a group of United States citizens who, simply because of their age, had not had the opportunity to contribute to the social security system for a sufficient number of quarters to qualify for benefits as generally provided under the Social Security Act. Since, by their very nature, these benefits could not be drawn from social security contributions, they were extended to only the general group of individuals who had been subject to Federal Income Tax; r.e., resident citizens of the United States and the District of Columbia. As plaintiff states on page 13 of his brief, there is no requirement for precise *quid pro quo* consideration in order for an individual to participate in the social security program. However, even plaintiff would have to concede that fiscal sanity is a legitimate congressional concern. Thus, Congress was within the scope of its constitutional authority in refusing to extend the payment of social security benefits to groups of individuals who generally had not contributed to either general

defined in 42 U.S.C. 1301(a)(8)), whereas Puerto Rico receives only up to one-half of its expenditures under the program plus an additional payment in lieu of the "Federal percentage" paid to the States. In addition, such a distinction is also contained in the Supplemental Security Income Program. P.L. 92-603 section 303(b). See also this distinction in the Elementary and Secondary Education Act of 1965 April 11, 1965, P.L. 89-10, Title II, section 202, 79 Stat.. 36 as amended 20 U.S.C.S. section 822.

revenues or the Social Security Trust Fund. To have extended the benefits under section 228 of the Social Security Act to territories such as Puerto Rico, Congress would have had to offset the additional expense by an increase in either income or the social security tax, or by diverting funds appropriated for some other purpose. In any case, such an extension of the benefits granted under section 228 of the Act to territories such as Puerto Rico would have to be almost totally financed by resident citizens of the United States thereby resulting in a gratuity to territories such as Puerto Rico. An indicated recently in *Geduldig* v. *Aiello, supra,* at page 4908 maintaining some degree of fiscal balance while holding contributions to a welfare program at affordable levels constitutes a legitimate governmental interest which will satisfy the rational basis test of equal protection. The holding simply recognizes the established principle that, "whether wisdom or unwisdom resides in a scheme of benefits set forth in Title II" is a determination to be made by Congress rather than the courts. *Fleming* v. *Nestor, supra.*

The fact that there may be some residents of Puerto Rico who pay income taxes does not prevent section 228 of the Act from satisfying the rational basis test as suggested on page 13 of plaintiff's brief. As illustrated in the quote from *Dandridge* v. *Williams, supra,* a classification need only have *some* rational basis to be constitutional. Accordingly, it is not constitutionally deficient if it is not made with "mathematical nicety". See also *Geduldig* v. *Aiello, supra,* citing *Dandridge* at page 4908.

The plaintiff has made contentions that this case involves a suspect class as was articulated in *Graham* v. *Richardson,* 403 U.S. 371 (1971) and *Smith* v. *Reynolds,* 277 Fed. Sup. 65 (1967). However, for the reasons outlined above, these contentions must fail. This case does not involve an alienage classification as in *Graham* but rather involves a statute which on its face limits coverage to all

eligible United States citizens residing within the 50 States and the District of Columbia. It no more precludes Puerto Rican citizens in Puerto Rico from coverage than any other citizen outside these boundaries.

As stated previously, strict judicial scrutiny is involved only where certain fundamental rights are involved. The plaintiff concedes in the quote from *Smith* v. *Reynolds* on page 8 of his brief that:

> "[t]here is of course, no constitutional right to receive public welfare. . . ."

Since the only issue involved herein is the right to receive public welfare benefits and since it is conceded that there is no vested right to receive these benefits, then at the very most only the traditional rational basis test should apply. See also *Richardson* v. *Belcher, supra.*

The plaintiff cites *United States* v. *Thompson,* 452 F.2d 1333 (D.C. Cir., 1971), cert. denied 405 U.S. 1075, for the proposition that the strict scrutiny test is applicable to legislation passed by Congress affecting a group of individuals who are not represented in Congress. The holding in the *Thompson* case was limited to the right to bail which the court determined was "fundamental" in that it involved issues of personal freedom in a most immediate and literal sense. The instant case however, does not involve a fundamental civil liberty in any way. Moreover, while there may be some validity to the invocation of the strict scrutiny test of equal protection where a group within a State or the District of Columbia is not represented in Congress, this argument does not have the same validity when a case involves the extension of social welfare rights to citizens of a territory.

Plaintiff cites the proposition in *Shapiro* v. *Thompson,* 394 U.S. 618 (1968) that "[t]he saving of welfare costs cannot justify an otherwise invidious discrimination" as applicable to the instant case. As shown *supra,* the pur-

pose of the enactment was not simply to save welfare costs nor is the classification invidious. The purpose of section 228 was to provide a special grant of benefits to resident American citizens and to balance payment of these benefits against taxes imposed against resident American citizens.

The memorandum submitted by the Commonwealth of Puerto Rico also cites *Shapiro* v. *Thompson, supra,* and alleges that section 228 of the Social Security Act infringes on the fundamental rights to travel just as the State statute did in *Shapiro.* This argument overlooks several important distinctions. The first of these distinctions is simply that section 228 of the Act does not inhibit the right to travel of the individuals represented by this class action. The plaintiff represents the class of Puerto Rican citizen-residents who are also American citizens by virtue of the Organic Act of 1917, 39 Stat. 951. These individuals are not precluded from receiving benefits under the section under consideration should they travel to the United States which is a situation analogous to the effect of the one-year residency requirement declared unconstitutional in *Shapiro.* The class of individuals represented herein actually *become* eligible for benefits under section 228 of the Act by the exercise of their prerogative to travel. The only class of individuals who become ineligible for benefits under section 228 of the Act by traveling are those individuals otherwise eligible under this section who are residents of the 50 States and the District of Columbia and who travel abroad. This class of individuals is not represented before this court and any claim they might have cannot be considered. *O'Shea* v. *Littleton,* 94 S.Ct. 669 (1974); *Dailey* v. *Patterson,* 82 S. Ct. 549 (1962); *Hammer* v. *Campbell,* 358 F. 2d 215 (5 Cir. 1966); *Brown* v. *Board of Trustees, etc.,* 187 F.2d 20 (5 Cir. 1951); *Cordova* v. *Bache & Co.,* 321 F.Supp. 600 (SDNY 1970). Of course, as mentioned previously, Puerto Rican citizens contained in this hypothetical class would have no basis for an equal protection argument since section 228 of the Act affects those individuals who have only

American citizenship as well as those who are also citizens of commonwealths, territories or other countries alike. Unlike the statute considered by the Court in *Shapiro* where two materially indistinguishable classes of residents of the United States were treated differently, section 228 of the Act treats all residents of the United States and the District of Columbia the same regardless of any territorial citizenship.

The foregoing is not intended to deny that section 228 of the Act applies differently to two different classes of individuals. Resident American citizens may be eligible for benefits thereunder while nonresident American citizens are not. This distinction, however, is consistently based on the legitimate governmental interest discussed previously.

Defendant would also submit that even assuming *arguendo,* that section 228 of the Act is deemed to chill the prerogative to travel of a member of the class which is represented, the Court in *Shapiro* v. *Thompson, supra,* would not invoke the equal protection test of strict judicial scrutiny in this present action. The reason for this is that the right of American citizens to *interstate* travel is entitled to greater constitutional protection that the right to *international* or *interritorial* travel. It was noted in *Shapiro* v. *Thompson, supra,* footnote 8, that the right to *interstate* travel is grounded in the Privileges and Immunity Clauses of Art. IV, section 2 of the United States Constitution which by its own language applies only to States.

The Court in *Shapiro* further took notice of the fact that:

> "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."

Thus, one of the fundamental purposes which the authors of the Constitution sought to accomplish was to bind the primarily autonomous states of the confederation into a strong Federal Union. Unrestricted interstate travel is crucial if this fundamental purpose is to be realized. The right of individuals to uninhibited travel between States then by necessity must be deemed a fundamental right protected by strict judicial scrutiny. However, there is no reason for the right to travel to a commonwealth, territory, or another country to ascend to the preferred position of a fundamental right. The fact of the matter is that Congress under its plenary power can limit rights to American citizens residing outside of the 50 States and the District of Columbia in ways that would not possibly withstand the test of constitutionality if applied to individuals within those boundaries. More specifically, as plaintiff mentions in his brief, the citizens of Puerto Rico do not have a voting member in the Congress of the United States, Puerto Rican residents do not vote in national elections of the United States, and products manufactured in Puerto Rico are subject to tariffs upon being marketed in the United States. These few examples, among many others, lead to the inevitable conclusion that Puerto Rico is simply not a State and, therefore, its residents cannot demand all of the rights and privileges afforded to residents of the United States. Thus, section 228 of the Social Security Act does not have to bear the burden of satisfying a compelling governmental interest as was the case with the statutes in *Shapiro* v. *Thompson, supra.*

Plaintiff seeks injunctive relief against the Secretary by means of an order from this three-judge court to be applicable to the class of individuals defined in the courts order of July 2, 1974. Defendant respectfully contends that the requested relief is inappropriate and cannot be granted for several reasons.

Plaintiff has invoked, and defendant has conceded, the jurisdiction of the district court under section 205(g) of the Social Security Act, 42 U.S.C. 405(g). This jurisdictional

statute is plaintiff's *sole* basis for contending that this court has jurisdiction. Jurisdiction exists over the claim of the plaintiff because he filed an application, exhausted the administrative remedies, and filed a timely civil action. The same cannot be said of the class plaintiff purports to represent and accordingly, there can be no jurisdiction of this court over the class. It is an established principle of this district that jurisdiction does not lie to review a decision "within the realm of the Secretary of Health, Education, and Welfare" when a claimant has not exhausted his administrative remedies and received a final decision of the Secretary. *Capella, et al.* v. *Vazquez,* Civil No. 997-71 (D. P.R., January 17, 1974); *Murga* v. *Secy. HEW, supra.* See also *Small* v. *Gardner,* 390 F.2d 186 (1 Cir., 1968), cert. denied. 393 U.S. 984. It is also of course true that the Declaratory Judgment Act, 28 U.S.C. 2201 is not an independent grant of jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950); *Capella* v. *Vazquez, supra.* Accordingly, in the absence of subject matter jurisdiction, the civil action should be dismissed with respect to the alleged class.

Even assuming, but not conceding, the court has jurisdiction over the alleged class, benefits could only be awarded beginning with the month in which all the conditions contained in section 228 of the Act are met. Thus there could be no retroactive award of benefits for either plaintiff or the alleged class; but, rather benefits could only be paid prospectively from the date each otherwise eligible individual fulfills the requirement of section 228(a)(4) of the Act 42 U.S.C. 428 (a)(4) and files an application.

The filing of an application as a pre-requisite requirement to establishing entitlement to benefits under title II of the Social Security Act is well accepted. *Ewing* v. *Risher,* 176 F.2d 641 (10 Cir., 1949); *Coy* v. *Folsom,* 228 F.2d 276 (3 Cir., 1955); *Ray* v. *Gardner,* 387 F.2d 162 (4 Cir., 1967); *McNally* v. *Flemming,* 183 F. Supp. 309 (D. N.J., 1960); *Flamm* v. *Ribicoff,* 203 F. Supp. 507 (S.D.N.Y., 1961).

Thus, in *Ewing* v. *Risher, supra*, the court pointed out that "rights" under title II of the Social Security Act are "creative rights" unknown to the common law and that only upon compliance with the conditions prescribed by Congress can an individual be entitled to its benefits. One of the conditions in that case, as in the instant case, was the filing of an application and the court's conclusion that entitlement to benefits was contingent on fulfilling that condition should obtain herein.

As a practical matter, the special provisions of section 228 of the Act became inapplicable to additional beneficiaries in 1971. As mentioned, the statute was intended to remedy the social welfare ills of a specific age group of residents in this country who were too old to have had an opportunity to satisfy the quarters of coverage requirement of section 214(a). As explained in section 812 of the Social Security Claims Manual (copy attached) a male individual who became 72 in 1972 needed only 14 quarters of coverage to be "fully insured" (one for each year after 1950 until he became 65) under section 214(a) of the Act while such an individual would need 15 quarters of coverage (three for each year after 1966 but before the year he attains age 72) to qualify under section 228(a) of the Act. Thus, it became easier in 1972 for an individual to qualify for benefits under the standard provisions of the Social Security Act than under the special provisions of the Prouty Amendment. The foregoing, coupled with the fact that this court is without the power to award retroactive benefits severely restricts the possible remedy which can be awarded. However, a decision of this court adverse to the power of Congress to limit social security benefits to residents of the United States would have a profound effect on other programs. (See generally the footnote, *supra*, listing some of the programs where Congress has differentiated between the United States and territories or commonwealths.)

The relief plaintiff requests is also inappropriate for another reason. While plaintiff seeks declaratory judgment

that section 228(e) of the Act is unconstitutional and to enjoin the Secretary, he also seeks to have the court redraft the statute to extend benefits payable thereunder to citizens of Puerto Rico. This section of the Act does not specifically exclude Puerto Rico from coverage thereunder. It simply stops short of providing benefits outside of the 50 States and the District of Columbia. Thus, there is no provision of the section which this court could strike out as unconstitutional, enjoin, or reinterpret which would provide plaintiff with the requested relief. To grant the relief for which plaintiff prays, this court would have to redraft the statute and expend money from the Federal Treasury. The court would thereby infringe upon the exclusive province of Congress to lay taxes and spend money in the general welfare. Article 1, section 8 of the Constitution of the United States; *Hutcheson* v. *United States*, 369 U.S. 599, 622 (1962); *Flemming* v. *Nestor, supra; Helvering* v. *Davis*, 301 U.S. 619, 640 (1937); *United States* v. *Butler*, 297 U.S. 1, 65 (1936).

CONCLUSION

Accordingly, defendant respectfully submits that section 228 of the Social Security Act, 42 U.S.C. 428 is constitutional, that this civil action should be dismissed as to the alleged class, and that with respect to plaintiff's individual claim, summary judgment should issue in favor of the Secretary of Health, Education and Welfare.

San Juan, Puerto Rico, August 21, 1974.

Respectfully submitted,

JULIO MORALES SANCHEZ
United States Attorney

By: /s/ IGNACIO RIVERA CORDERO
Ignacio Rivera Cordero
Assistant U.S. Attorney

(Certificate Omitted in Printing)

APPENDIX B

(Caption Omitted in Printing)

Reply Memorandum By Amicus Curiae, Commonwealth Of Puerto Rico

To The Honorable Court:

Comes now the Commonwealth of Puerto Rico and respectfully submits this Reply Memorandum to Defendant's Supplemental Brief filed on August 21, 1974.

This Memorandum will only cover some aspects of the issues raised by Defendant in the above document, to wit- their contention that the decision in *Murga Murga* v. *Secretary of H.E.W.*, Civil No. 351-70, Dec. 30, 1971 is still authority for the propositions that Congress has plenary power in determining which domestic laws extend to territories and that Puerto Rico is a territory. (Defendant's Brief, page 2). This is not so.

The above contention has no merit whatsoever. It is strictly based upon some dicta set forth in that unpublished and unreported decision. As such it is evident that dicta does not have any binding or persuasive effect upon the issues herein presented.

Even the author of *Murga*, the former Chief Judge Hiram R. Cancio, recognized the above and saw fit to retract from any and all expressions which might have been interpreted as Defendant herein has done. In the recent case of *Hodgson, Secretary of Labor* v. *Union Empleados de los SUPERMERCADOS PUEBLO*, (D-C. P.R. 1974), 371 F.Supp. 56, Judge Cancio expressly overruled his *Murga* comments. After citing a long list of decisions which sustain the validity of the compact and its binding effect, he stated: (Id. page 59, ft. 6)

> "Any expression of this Court to the contrary in the case of *Murga* v. *Secretary of Health, Education*

> *and welfare,* Civil 51-70 CDC PR, Dec. 30, 1971), which was not intended to be published nor was published by the Court, may be disregarded."[1]

And in Hodgson, supra, the Court expressly rejects the contention brought forth by Defendant to the effect that the Commonwealth of Puerto Rico is still a territory subject to the plenary power of Congress.[2] It said that:

> "Puerto Rico ceased being a *territory* of the United States subject to the plenary powers of Congress as provided in Art. IV, Section 3, clause 1 of the Federal Constitution'. . . Whatever authority was to be exercized over Puerto Rico by the Federal Government would emanate thereon, not from Act. 10 of the Constitution, but from the compact itself, voluntarily and freely entered into by the people of Puerto Rico . . ."[3]

Judge Cancio fully developed his concepts as to the effects of federal statutes upon the rights of U.S. citizens in Puerto Rico in his landmark decision in *Liquilux Gas Services of Ponce, Inc.* v. *Tropical Gas Company,* 303 F.

---

[1] Thus it is truly surprising and incomprehensive that the attorneys for the United States government have completely disregarded Judge Cancio's express rejection of the *Murga* approach and persist in citing as the principle basis for their erroneous contentions the dicta in an unpublished opinion.

[2] In the recent cases of *Acevedo-Montalvo* v. *Hernández Colón,* Civil No. 1113-73, (June 18, 1974) the Court stated:

> "On the other hand continued application of the doctrine of 'unincorporated territories' is perceived as both historically and politically anachronistic, and even demeaning to the present statutes of the Commonwealth".

[3] For the recent decisions by the First Circuit on the applicability of federal statutes upon Puerto Rico see, *N.L.R.B.* v. *Security National Life Ins. Co.*, 494 F. 2d 336 (1974) and *Caribtow* v. *Occupational Safety and Health Review Comm.*, 493 F. 2d 1064.

Supp. 414 (1969). After a thorough historical analysis he stated as follows:[4]

"It is most significant to note that in 25 cases[3] decided in a variety of forums since 1952 involving the applicability of pre-Commonwealth federal statutes to

[3] Krisel v. Duran, 386 F. 2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042, 88 S. Ct. 1635, 20 L. Ed. 2d 303 (1968); Americana of Puerto Rico, Inc. v. Kaplus, 368 F. 2d 431 (3rd Cir. 1966), *cert. denied*, 386 U.S. 943, 87 S. Ct. 977, 17 L. Ed. 2d 874 (1967); United States v. De Jesús, 289 F. 2d 37 (2d Cir. 1961), *cert. denied*, 366 U.S. 963, 81 S. Ct. 1924, 6 L. Ed. 2d 1254 (1961); Valpais v. United States, 289 F. 2d 607 (1st Cir. 1961); Moreno Ríos v. United States, 256 F. 2d 68 (1st Cir. 1958); Dario Sánchez v. United States, 256 F. 2d 73 (1st Cir. 1958), *cert. denied*, 372 U.S. 931, 83 S. Ct. 877, 9 L. Ed. 2d 734 (1963); Detres v. Lions Bldg. Corp. 234 F. 2d 596 (7th Cir. 1956); Mora v. Mejias, 206 F. 2d 377 (1st Cir. 1953); Feliciano v. United States, 297 F. Supp. 1356 (D.P.R. 1969); Alcoa Steamship Co. v. Perez, 295 F. Supp. 187 (D.P.R. 1968); Cooperativa de Seguros Multiples de Puerto Rico v. San Juan, 289 F. Supp. 983 (D.P.R. 1968); United States v. Valentine, 288 F. Supp. 957 (D.P.R. 1968); David Cabrera, Inc. v. Unión de Choferes y Dueños, 256 F. Supp. 839 (D.P.R. 1966); Securities and Exchange Commission v. Quing N. Wong, 252 F. Supp. 608 (D.P.R. 1966); Kane v. Republica de Cuba, 211 F. Supp. 855 (D.P.R. 1962); Lummus Co. v. Commonwealth Oil Refinery Co., 195 F. Supp. 47 (S.D.N.Y. 1961); Trigo Bros. Packing Corp. v. Davis, 159 F. Supp. 841 (D.P.R. 1958), vacated on other grounds, 266 F. 2d 174 (1st Cir. 1959); Mitchell v. Rubino, 139 F. Supp. 379 (D.P.R. 1956); United States v. Figueroa Ríos, 140 F. Supp. 376 (D.P.R. 1956); United States v. Mejias, 131 F. Supp. 957 (D.P.R. 1955); Cosentino v. International Longshoremen' Ass'n, 126 F. Supp. 420 (D.P.R. 1954); Carrión v. González, 125 F. Supp. 819 (D.P.R. 1954); Arbona v. Kenton, 126 F. Supp. 366 (S.D.N.Y. 1954); Mora v. Mejías, 115 F. Supp. 610 (D.P.R. 1953); Hilton Hotels International Inc., 37 L.R.R.M. 1474 (P.R. Lab. Rel. Bd. 1955).

[4] On the merits the Court held that the Robinson-Patman Act did not apply after the Commonwealth initiation in 1952 to purely local actions. The Court thus rejected the contention that Puerto Rico is still to be considered as a territory, because: "To hold otherwise would be frustrative of the very purpose for which the Commonwealth was created". (Id. at page 421)

events in or citizens of Puerto Rico, pre-Commonwealth laws have been applied in precisely the same manner as they would have applied if the events had occurred in a state or the individuals had been citizens of a state. In those decisions in which Puerto Rico has been still referred to as a 'territory' the result of that conclusion has been that the federal statute involved was given the same effect with respect to Puerto Rico as in a state. Indeed, in every such case the result of a contrary conclusion would have been that Puerto Rico citizens would have received less protection under the federal law than citizens of a state.

In three of the cases decided since 1952, precisely the same issue was involved as is presented in this case, namely, whether, following the advent of Commonwealth status, a federal statute enacted in pre-Commonwealth days, defining commerce not only as trade between states but also as trade within a territory, still applies to purely intra-Puerto Rican activity by virtue of this definition.[4] In each of these cases the applicable statute, in addition to regulating interstate commerce, was intended to regulate purely internal commerce in pre-Commonwealth Puerto Rico, which of course, Congress was empowered to do. In each case the court held that following the creation of the Commonwealth it would be inconsistent with Commonwealth status for the federal law to continue to have greater applicability in Puerto Rico than in a state.

[4] United States v. Figueroa Ríos, 140 F. Supp. 376 (D.P.R. 1956) (Federal Firearms Act); Trigo Bros. Packing Corp. v. Davis, 159 F. Supp. 841 (D.P.R. 1958), vacated on other grounds, 266 F. 2d 174 (1st Cir. 1959) (Federal Alcohol Administration Act); and Hilton Hotels International, Inc., 37 L.R.R.M. 1474 (P.R. Lab. Rel. Bd. 1955) (Labor Management Relations Act of 1947)".

Thus it is abundantly clear that Defendant's apparent arguments that Puerto Rico continues to be a territory and that its citizens[5] are not protected by the applicable provisions of the United States Constitution are clearly uncalled for.

[5] We fail to understand what defendant means by such concepts as territorial citizens.

Even when Puerto Rico was considered as an unincorporated territory the First Circuit held that the equal protection of the laws protection embodied in the Fifth Amendment protected Pre-Commonwealth United States citizens in Puerto Rico. *Cases* v. *U.S., ICA,* 1942, 131 F.2d 916, cert. den. sub. nom. *Velázquez* v. *U.S.,* 319 U.S. 770, which held at 920 that: "the restriction imposed upon Congress by the due process clause of the Fifth Amendment is applicable to the situation of Puerto Rico at the present time". As to these restrictions upon Congress action, which is the real issue in the present case, see the comments in the abortion law case, *Acevedo Montalvo,* supra, at footnote 7, which reads as folows:[6]

> "7. There was no majority position of the Court. Separate concurring opinions were written by Mr. Justice Gray and Mr. Justice White, whose opinion was joined by Justices Shiras and McKenna. There were four dissenting votes. However, the position taken in the quoted passage received wide support, the opinion of Mr. Justice White agreeing that, while not all constitutional protections apply in unincorporated territories, 'there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed'. 182 U.S. at 291. Mr. Justice White later declared that, '[t]here is in reason then no room in this case to contend that Congress can destroy the liberties of the people of Puerto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied' 182 U.S. at 298. The four dissenting Justices noted with approval that '[t]he concurring opinion [of Mr. Justice White] recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guarantees of life, liberty, and property . . . .' 182 U.S. at 373. See also 182 U.S. at 364 (Fuller, C.J., Harlan, Brewer and Peckman, JJ. dissenting)".

[6] And citing from Judge Brown's opinion in *Downes* v. *Bidell,* the Court stated the Puerto Rico citizens were: "entitled to under the principles of the Constitution to be protected in life, liberty and property". 182 U.S. at 282-83

And in *Ramos* v. *U.S. Civil Service Commission,* 376 F. Supp. 361 (1974), this Court, through Judge Campbell's opinion, recognized that Congress is bound to observe the equal protection of the laws principle embodied in the Due Process Clause of the Fifth Amendment and overturned some federal statutes and regulations which discriminated against aliens. If aliens are thus protected, then defendants position that United States citizens in Puerto Rico have lesser rights is untenable and frivolous.

Of course all the doctrines cited in this Memorandum have been explicitly or by implication accepted by the United States Supreme Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 40 L.ed.2d 452, 94 S.Ct. 2080 (1974), where the Court recognized the significant changes brought about the establishment of the Commonwealth and refused to consider it as a territory.

Thus we reject Defendant's contention that Congress has plenary power under the territorial clause of the United States Constitution to disregard the rights of United States citizens in Puerto Rico and that its power is not restricted by the applicable provisions of that Constitution. We also contend, that the *Murga* decision has never been and is not the correct interpretation of United States and Puerto Rico relationship.[7]

San Juan, Puerto Rico, this 11th day of September, 1974

MIRIAM NAVEIRA DE RODON
Solicitor General

PETER ORTIZ
Deputy Solicitor General

RUTH TENTORI DE LEBRON-VELAZQUEZ
Assistant Solicitor General

(Proof of Service Omitted in Printing)

[7] For an exhaustive discussion of *Murga,* see Rev. Jurídica U.P.R., Vol. XLII, pages 153-176 (1973).

APPENDIX C

(Caption Omitted in Printing)

Supplemental Memorandum

This memorandum is intended to supplement the Defendant's Supplemental Brief in Support of Motion for Summary Judgment filed herein on August 21, 1974.

The defendant respectfully moves the Court to disregard all references to the territorial status of Puerto Rico made specifically in the discussion at pages 2 and 3 of the above mentioned Brief.

In accordance with the recent decision of *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 94 S.Ct. 2080 (1974), Puerto Rico has ceased to be a territory of the United States and has acquired the Commonwealth status by the terms of the compact offered to them by Congress in Public Law 600 and the constitution adopted by the people of Puerto Rico and approved by Congress on July 3, 1952. Therefore, Puerto Rico's status no longer should be referred to as a territory.

Notwithstanding, this mischaracterization of Puerto Rico as a territory is entirely apart from the merits of this case. It has no bearing whatsoever on the congressional power to enact social security legislation in accordance with the legitimate governmental objective of making social security old-age benefits available only to those citizens who have contributed to the social security system either by way of quarterly contributions or Federal income tax payments, residing within the fifty States and the District of Columbia.

WHEREFORE, the defendant respectfully requests the Court to take note of this change in the references to Puerto Rico's status in the Supplemental Brief for Motion

of Summary Judgment as this mischaracterization will not vary the substance of the controversy in this case.

San Juan, Puerto Rico, December 17, 1974.

JULIO MORALES SANCHEZ
United States Attorney

/s/ By: JOSE A. ANGLADA
José A. Anglada
Assistant U.S. Attorney

(Certificate of Service Omitted in Printing)

APPENDIX D

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C.

Honorable Francisco de Jesus Schuck
Secretary of Justice
Office of the Attorney General
Commonwealth of Puerto Rico
San Juan, Puerto Rico 00904

Dear Mr. Secretary:

This will respond to your letter dated September 30, 1974, asking that we take appropriate action to clarify our view of the status of Puerto Rico with regard to *Jesus Rodriguez* v. *Elliott Richardson, Secretary of Health, Education, and Welfare,* Civil Action No. 1099-72.

Regrettably, the brief unnecessarily and incorrectly characterized Puerto Rico as a "territory" in making these arguments. As you yourself noted in your letter, this characterization was nonessential and in fact irrelevant to the legal considerations at hand, specifically, whether Congress had acted in accordance with a legitimate governmental objective in granting old-age benefits only to those persons residing within the fifty States and the District of Columbia who had not made sufficient quarterly contributions to otherwise qualify for social security benefits.

We are therefore, instructing the United States Attorney for the District of Puerto Rico to advise the Court to disregard those portions of our brief which characterize Puerto Rico as a "territory". We trust that this will respond satisfactorily to your request.

Sincerely,

/s/ LAURENCE H. SILBERMAN
Laurence H. Silberman
Deputy Attorney General